

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

RENEE STEPHENS, )  
Plaintiff, ) 3:11-cv-00736-HU  
vs. ) FINDINGS AND  
NIKE, INC., ) RECOMMENDATION  
Defendant. )

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Renee Stephens  
renee.stephens1@comcast.net  
7135 SW 54<sup>th</sup> Avenue  
Portland, Oregon  
Telephone: (503) 977-7935

Plaintiff *Pro Se*

Amy Joseph Pedersen  
ajpedersen@stoel.com  
P.K. Runkles-Pearson  
pkrp@stoel.com  
STOEL RIVES LLP  
900 SW Fifth Avenue, Suite 2600  
Portland, OR 97204  
Telephone: (503) 224-3380  
Facsimile: (503) 220-2480

Attorneys for Defendant

1 HUBEL, Magistrate Judge:

2 Plaintiff Renee Stephens ("Stephens") filed this employment  
3 action against defendant Nike, Inc. ("Nike") on June 17, 2011,  
4 alleging discrimination, harassment, and retaliation in violation  
5 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et  
6 seq., and Oregon Revised Statute ("ORS") 659A.030. This court has  
7 original jurisdiction over Stephens' federal claims, 28 U.S.C. §  
8 1331, and supplemental jurisdiction over his state law causes of  
9 action, 28 U.S.C. § 1337. Now before the court are Nike's motion  
10 to compel responses to interrogatories and production of documents,  
11 and Nike's motion for sanctions. For the reasons that follow,  
12 Nike's motion (dkt. #50) to compel should be **DENIED** as moot and  
13 Nike's motion (dkt. #53) for sanctions should be **GRANTED** in part  
14 and **DENIED** in part.

15 **I. RELEVANT PROCEDURAL BACKGROUND**

16 On October 24, 2011, a case management conference was held  
17 pursuant to Federal Rule of Civil Procedure ("Rule") 16. On that  
18 same day, the court issued a Rule 16 scheduling order establishing  
19 a deadline of February 17, 2012 for completion of all discovery,  
20 and a deadline of March 2, 2012 for the filing of pretrial  
21 dispositive motions. (Dkt. #17.)

22 On November 8, 2011, Nike served Stephens with requests for  
23 production under Rule 34 and interrogatories under Rule 33.  
24 (Def.'s Mem. Supp. Mot. Compel at 2.) Because Stephens never  
25 responded to those requests, Nike's counsel emailed Stephens on  
26 December 19, 2011, informing him that he had not responded in a  
27 timely manner, requesting that he provide documents and  
28

1 interrogatory responses, and proposing dates for his deposition.

2 (*Id.*)

3 On December 22, 2011, having received no response, Nike's  
 4 counsel wrote Stephens via first class mail and certified mail,  
 5 telling Stephens that counsel had not received a response to its  
 6 December 19 email and reiterating the content of the email. (*Id.*)  
 7 Nike's counsel later received the return receipt for the certified  
 8 letter, which was signed "Renee Stephens." (*Id.*)

9 On January 4, 2012, Nike's counsel still had not received a  
 10 response from Stephens, but was able to reach him at his home  
 11 telephone number. (*Id.*) According to Nike's counsel, "[Stephens]  
 12 admitted that he had received the email and the letter, but . . .  
 13 refused to provide any date by which he would respond to the  
 14 discovery requests . . . [and] refused to provide any date when  
 15 Nike could take his deposition."<sup>1</sup> (*Id.* at 2-3.) Nike's counsel  
 16 informed Stephens that it had no choice but to file a motion to  
 17 compel. (*Id.* at 3.)

18 On January 9, 2012, Nike filed its motion to compel,  
 19 requesting that the court order Stephens to provide a response to  
 20 its interrogatories and to provide all documents responsive to its  
 21 requests for production.<sup>2</sup> (Dkt. #50.) On that same day, Nike  
 22

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23 <sup>1</sup> Apparently, Stephens told Nike's counsel, "I have a life. I  
 24 have kids. I have a job. . . . I'll respond to your request later."  
 (Runkles-Pearson Decl. Supp. Def.'s Mot. Compel. ¶ 3.)

25 <sup>2</sup> In its supporting memorandum, Nike's counsel indicated that  
 26 they would notice Stephen's deposition for one of the dates it  
 27 proposed since Stephens failed to respond to their good faith  
 28 requests to confer regarding the scheduling of his deposition.  
 (Def.'s Mem. Supp. Mot. Compel at 3 n.1.) The Local Rules for the  
 District of Oregon state that, "[e]xcept for good cause, counsel  
 will not serve a notice of deposition until they have made a good

1 served Stephens by first class mail and certified mail with a  
 2 notice that it would take his deposition at the law offices of  
 3 Stoel Rives LLP in Portland, Oregon, at 9:30 a.m., on January 27,  
 4 2012. (Runkles-Pearson Decl. ¶¶ 5, 7.)

5 Stephens did not appear for his deposition on January 27,  
 6 2012, nor did he call or email Nike's counsel regarding any  
 7 scheduling conflict.<sup>3</sup> (*Id.* ¶ 7.) After 10:00 a.m., counsel  
 8 attempted to call Stephens at his last-known telephone number, but  
 9 reached only an automated message. (*Id.*)

10 On February 1, 2012, Nike's counsel telephoned Stephens to  
 11 confer regarding a motion for sanctions. (*Id.* ¶ 13.) Because  
 12 Nike's counsel was unable to reach Stephens, they left him a  
 13 voicemail and email. (*Id.*) Nike's counsel's February 1, 2012  
 14 email was sent at 3:56 p.m. and states:

15 Mr. Stephens:

16 This follows my voicemail to you on the same subject. As  
 17 I mentioned in that voicemail, Nike intends to move for  
 18 sanctions (including fees and dismissal of your case)  
 19 because you failed to appear for your properly noticed  
 20 deposition on [January 27] and have not responded to  
 21 Nike's discovery requests or its motion to compel. I am  
 22 trying to reach you to confer about that motion. Please  
 23 call me as soon as possible to discuss.

24  
 25 If I do not hear from you, I will file the motion  
 26 tomorrow morning around 10 AM.

27 (*Id.* Ex. 3.)

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1       On February 2, 2012, at 3:06 p.m., Nike filed its motion for  
 2 sanctions against Stephens, requesting that the court dismiss  
 3 Stephens' claims with prejudice and award Nike its reasonable  
 4 expenses and attorneys' fees incurred as a result of Stephens'  
 5 failure to comply with his discovery obligations. (Dkt. #53;  
 6 Def.'s Mem. Supp. Mot. Sanctions at 1.)

7       On February 6, 2012, Stephens was ordered to show cause, in  
 8 writing, by March 9, 2012, why this case should not be dismissed  
 9 for failure to prosecute. (Dkt. # 56.) Stephens never responded  
 10 to Nike's motion to compel; however, on February 6, 2012, he filed  
 11 a response to Nike's motion for sanctions. (Dkt. #58.)

12       In his response, Stephens says he "has not refused to comply  
 13 with Nike's requests for discovery" and that he explained to Nike's  
 14 counsel "that he is experiencing a very difficult time in his life  
 15 and needs more time to comply with [Nike]'s requests." (Pl.'s  
 16 Resp. Def.'s Mot. Sanctions (dkt. #58) at 1.) In support of his  
 17 position, Stephens indicates that he and his wife have four  
 18 children, one of which was diagnosed with diabetes in July 2011 and  
 19 another that injured her knee in November 2011. (*Id.*) Despite the  
 20 rapidly approaching February 17, 2012 discovery cut off date, *i.e.*,  
 21 eleven days after the filing of his response to Nike's motion for  
 22 sanctions, Stephens claims Nike's counsel "has continued to  
 23 unreasonably press [me] for its discovery requests." (*Id.* at 2.)

24       Nike's counsel filed a reply brief on February 9, 2012,  
 25 stating:

26       Nothing in [Stephens'] response to Nike's motion for  
 27 sanctions explains why [Stephens] not only failed to  
 28 respond to discovery requests and appear for his deposition, but why [Stephens] also failed to respond to  
 counsel's repeated requests for even the most basic

1 contact and meaningful conferral. . . . [Stephens] never  
 2 once called or emailed to let Nike know that he would not  
 3 provide responses or attend his deposition.

4 (Def.'s Reply Supp. Mot. Sanctions at 1) (emphasis in the  
 5 original).

6 On March 9, 2012, Stephens responded to the court's order to  
 7 show cause, stating, amongst other things, that:

8 Dismissing this case will not stop me from continuing to  
 9 pursue [Nike]. I will simply continue to apply for  
 10 positions that I qualify for at [Nike] and when they do  
 11 not hire me, because they already told me that they will  
 12 never hire me again, I will file new EEOC charges and we  
 13 will all find ourselves back here again. Dismissing this  
 14 case without thorough litigation will not benefit any  
 15 party involved, including this Court. We [will] only  
 16 face more protracted litigation, which is wasting  
 17 everyone's time and money.

18 (Pl.'s Resp. Order Show Cause at 1.) Stephens also requests that  
 19 the court "allow this pending litigation to proceed and merge this  
 20 case with" *Stephens v. Multnomah County*, 3:12-cv-00171-MO (D. Or.  
 21 filed Jan. 30, 2012). (Pl.'s Resp. Order Show Cause at 8.) The  
 22 named defendants in the proceeding before Judge Mosman include  
 23 Nike, Amy Joseph Pedersen ("Pedersen"), P.K. Runkles-Pearson  
 24 ("Runkles-Pearson"), Stoel Rives LLP, Phil Knight, and several  
 25 Oregon state court judges.

## 26 ***II. DISCUSSION***

27 Nike moves the court for an order dismissing this action with  
 28 prejudice and awarding Nike its reasonable costs and fees incurred  
 as a result of Stephen's failure to comply with his discovery  
 obligations. Rule 37(d)(1)(A) states that, on motion, a court may  
 order sanctions if "(i) a party . . . fails, after being served  
 with proper notice, to appear for that person's deposition; or (ii)  
 a party, after being properly served with interrogatories under

1 Rule 33 . . . fails to serve its answers, objections, or written  
 2 response." FED. R. CIV. P. 37(d) (1) (A). Such sanctions may include,  
 3 *inter alia*, "dismissing the action or proceeding in whole or in  
 4 part[.]" FED. R. CIV. P. 37(b) (2) (A) (v). Moreover, "instead of or  
 5 in addition to these sanctions, the court must require the party  
 6 failing to act . . . to pay the reasonable expenses, including  
 7 attorney's fees, caused by the failure, unless the failure was  
 8 substantially justified or other circumstances make an award of  
 9 expenses unjust." FED. R. CIV. P. 37(d) (3).

10 In determining whether to exercise its discretion to dismiss  
 11 an action under Rule 37, the court weighs "(1) the public's  
 12 interest in expeditious resolution of litigation; (2) the court's  
 13 need to manage its docket; (3) the risk of prejudice to the  
 14 defendants; (4) the public policy favoring disposition of cases on  
 15 their merits; and (5) the availability of less drastic sanctions."  
*16 Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1022  
*17* (9th Cir. 2002) (citation omitted). The key factors, however, are  
 18 prejudice and availability of lesser sanctions. *Wanderer v.*  
*19 Johnston*, 910 F.2d 652, 656 (9th Cir. 1990).

20 To begin with, I note that the Ninth Circuit  
 21 "encourage[s] dismissal . . . where the district court determines  
 22 that . . . a party has acted willfully or in bad faith in failing  
 23 to comply with rules of discovery or . . . in flagrant disregard of  
 24 those rules." *Sigliano v. Mendoza*, 642 F.2d 309, 310 (9th Cir.  
 25 1981) (citation and internal quotation marks omitted). Indeed,  
 26 [l]itigants who are willful in halting the discovery  
 27 process act in opposition to the authority of the court  
 28 and cause impermissible prejudice to their opponents. It  
 is even more important to note, in this era of crowded  
 dockets, that they also deprive other litigants of an

1 opportunity to use the courts as a serious  
2 dispute-settlement mechanism.

3 *G.K. Properties v. Redevelopment Agency*, 577 F.2d 645, 647 (9th  
4 Cir. 1978).

5 That said, I conclude that dismissal is an appropriate Rule 37  
6 sanction based on *Rio Properties'* multi-factor test. In *Barker v.*  
7 *Hertz Corp.*, No. CV 07-554-PHX-MHM, 2008 WL 2705152 (D. Ariz. June  
8 26, 2008), the court concluded that *Rio Properties'* five-factor  
9 test "weigh[ed] heavily in favor of dismissal" based, most notably,  
10 on (1) the plaintiff failing to respond to the defendant's first  
11 request for production of documents and first set of  
12 interrogatories; and (2) the passing of the discovery cutoff date  
and dispositive motions deadline. *Id.* at \*5-6.

13 Similarly, in this case, as in *Barker*, Stephens failed to  
14 respond to Nike's November 8, 2011 requests for production under  
15 Rule 34 and interrogatories under Rule 33. The discovery cutoff  
16 date and dispositive motions deadline also passed on February 17,  
17 2012, and March 2, 2012, respectively. Stephen's failure to meet  
18 his discovery obligations and to abide by this court's scheduling  
19 order has led to the discovery and dispositive motion deadlines  
20 elapsing without any meaningful exploration of Stephen's claims,  
21 which, in turn, has prejudiced Nike. See *Barker*, 2008 WL 2705152,  
22 at \*5 (making similar observations).

23 Further, conduct that rises to the level of willfulness, bad  
24 faith, or fault, e.g., conduct not shown to be outside the control  
25 of the litigant, *Hyde & Drath v. Baker*, 24 F.3d 1162, 1167 (9th  
26 Cir. 1994), is sufficient to justify dismissal. *Henry v. Gil*  
27 *Indus.*, 983 F.2d 943, 948-49 (9th Cir. 1993). Failing to respond  
28

1 to discovery requests or to submit to deposition is "hardly  
2 'outside the control of the litigant.'" *Id.* at 949 (quoting *United  
3 Artists Corp. v. La Cage Aux Folles*, 771 F.2d 1265, 1270 (9th Cir.  
4 1985)).

5 Stephens has offered various explanations for his discovery  
6 misconduct, but none persuade me that circumstances outside his  
7 control caused his transgressions. For example, Stephens claims he  
8 "has not even had time to formulate or make his own discovery  
9 requests in th[is] action" and that he "is not an attorney and does  
10 not enjoy dedicated time to deal with his legal issues." (Pl.'s  
11 Resp. Def.'s Mot. Sanctions at 2.) Yet, on January 30, 2012, three  
12 days after he was supposed to submit to deposition, Stephens had  
13 the time to file a sixty-one page complaint in this court against  
14 a bevy of defendants, including Nike and its counsel, Pedersen and  
15 Runkles-Pearson.

16 Stephens' claim that his children's health problems interfered  
17 with his ability to respond to the discovery requests seems  
18 disingenuous. As a matter of routine, I ask the parties when their  
19 schedules will allow completion of discovery knowing they have a  
20 much clearer insight into their scheduling issues and other  
21 commitments than the court does. When the court discussed the  
22 selection of discovery deadlines at the Rule 16 conference on  
23 October 24, 2011, Stephens made no mention of the child allegedly  
24 diagnosed with diabetes in July 2011.

25 Stephens is not an attorney, but he is no stranger to  
26 litigation and threatens to continue filing more and more cases  
27 with no offer of compliance with his obligations as a party to  
28 follow courts rules, orders and deadlines. Indeed, he has already

1 multiplied the litigation in this court with his new case filed  
 2 surrounding many of these same issues on January 30, 2012.

3 Overall, the record suggests that Stephens acted in willful  
 4 disobedience of his discovery obligations. (See Pl.'s Resp. Def.'s  
 5 Mot. Sanctions at 3) ("[Nike] is asking for information from the  
 6 plaintiff [that] is very similar to what it obtained in [a]  
 7 previous state case. The plaintiff should not have to go through  
 8 such an ordeal again just to have his issues addressed [by] this  
 9 Court. . . . [I] will not subject [my]self to further psychological  
 10 and emotional harm by the defendant by appearing at a  
 11 deposition[.]"); (see also Stephens Decl. ¶ 7) (indicating that  
 12 Stephens should not have to interact with Nike's counsel until the  
 13 proceeding before Judge Mosman has been resolved).

14 In short, considering Stephen's inaction and failure to comply  
 15 with Nike's counsel's discovery requests and this court's  
 16 scheduling order, no meaningful lesser sanction than dismissal  
 17 exists. To date, Stephens "has filed six EEOC charges, two state  
 18 court lawsuits, one appeal and this federal lawsuit against Nike,  
 19 all related to his layoff from Nike. All but this lawsuit have  
 20 been dismissed." (Runkles-Pearson Decl. ¶ 2.)<sup>4</sup> There is no reason  
 21 to prolong this dispute any further.

22 This conclusion is bolstered by the fact that Stephens sued  
 23 Nike in Washington County Circuit Court in July of 2008, alleging  
 24 employment discrimination and retaliation in violation of ORS  
 25

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26       <sup>4</sup> It does not appear that Nike's counsel accounted for  
 27 Stephens' case before Judge Mosman, which was filed three days  
 28 prior to the filing of her declaration and also includes  
 allegations regarding his employment with Nike. (03:12-cv-00171-MO  
 (dkt. #2) ¶ 9.)

1 659A.030. As I noted in my June 29, 2011 Order denying Stephens'  
 2 application to proceed *in forma pauperis* and motion for appointment  
 3 of *pro bono* counsel,

4 [a] search of Washington County Circuit Court records  
 5 reveals that Nike's motion for summary judgment was  
 6 granted in the state court proceeding, and judgment was  
 7 entered against Stephens on April 8, 2009. Stephens  
 8 appealed, and the Oregon Court of Appeals affirmed the  
 9 trial court's grant of summary judgment on December 29,  
 2010. *Stephens v. Nike, Inc.*, 240 Or. App. 352, 246 P.3d  
 773 (Table, No. A141956) (Dec. 29, 2010). The Oregon  
 Supreme Court denied further review on April 7, 2011.  
*Stephens v. Nike, Inc.*, 350 Or. 230, \_\_\_ P.3d \_\_\_ (Table,  
 No. A141956, S059178) (Apr. 7, 2011).

10 In the present case, it appears that, in addition to  
 11 some new claims, Stephens is attempting to assert the  
 12 same claims that already were adjudicated in the state  
 13 court case. To the extent Stephens brings the same claims  
 against Nike that he brought in the state court action,  
 the doctrine of *res judicata* or claim preclusion would  
 bar relitigation of those claims in this court.

14 (Dkt. #8, at 2-3.)

15 With respect to monetary sanctions, indigency, standing alone,  
 16 does not make an award of expenses or attorney's fee unjust.  
*Barker*, 2008 WL 2705152, at \*8 (citation omitted). As the Supreme  
 18 Court has recognized, *pro se* litigants "have a greater capacity  
 19 than most to disrupt the fair allocation of judicial resources  
 20 because they are not subject to the financial considerations-  
 21 filing fees and attorney's fees- that deter other litigants from  
 22 filing frivolous petitions." *In re Sindram*, 498 U.S. 177, 180, 111  
 23 S. Ct. 596, 112 L. Ed. 2d 599 (1991). Nevertheless, I conclude  
 24 that Stephens, who resigned from his latest position as a security  
 25 guard,<sup>5</sup> should not be required to pay fees and costs in this case.

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27       <sup>5</sup> (See Pl.'s Resp. Order Show Cause at 8) ("I have now been  
 28 disqualified from receiving food stamps because 'I quit my  
 productive job' [as a security guard].")

1 See *Elliott v. United Parcel Serv., Inc.*, No. C07-05453 RBL, 2009  
2 WL 213004, at \*2 (W.D. Wash. Jan. 28, 2009) (holding "it would be  
3 unjust to require a *pro se* plaintiff to pay fees and costs for the  
4 depositions.") Dismissal alone is an appropriate sanction.  
5 However, a continuation of further litigation without complying  
6 with court rules, orders and deadlines may warrant a different  
7 result in the future.

### ***III. CONCLUSION***

9 For the foregoing reasons, Nike's motion Nike's motion (dkt.  
10 #53) for sanctions should be **GRANTED** in part and **DENIED** in part.  
11 This case should be dismissed with prejudice, but Nike's counsel  
12 should not be awarded fees or costs. As a result, Nike's motion  
13 (dkt. #50) to compel should be **DENIED** as moot.

14 Alternatively, if the district judge deems dismissal  
15 inappropriate, then Stephens should be given two weeks to: (1)  
16 respond to Nike's interrogatories; (2) produce all responsive and  
17 otherwise producible documents; and (3) submit to deposition.<sup>6</sup>  
18 Absent a persuasive justification to the contrary, Stephens'  
19 deposition should be held in the courthouse for no longer than  
20 seven hours and the parties must utilize a single court reporter or  
21 means by which to record his deposition.

22 | //

23 | //

24 | //

26         <sup>6</sup> At the hearing on March 6, 2012, Stephens said he could  
27 respond to the request for production and interrogatories as well  
28 as sit for his deposition within two weeks, despite not doing so  
since the order to show cause of February 6, 2012.

1                   **IV. SCHEDULING ORDER**

2       The Findings and Recommendation will be referred to a district  
3 judge. Objections, if any, are due **April 6, 2012**. If no  
4 objections are filed, then the Findings and Recommendation will go  
5 under advisement on that date. If objections are filed, then a  
6 response is due **April 23, 2012**. When the response is due or filed,  
7 whichever date is earlier, the Findings and Recommendation will go  
8 under advisement.

9       Dated this 19th day of March, 2012.

10                   /s/ Dennis J. Hubel

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12                   Dennis James Hubel  
13                   United States Magistrate Judge  
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